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PAUL DeWOLFE
PUBLIC DEFENDER

KEITH LOTRIDGE
DEPUTY PUBLIC DEFENDER

MELISSA ROTHSTEIN
DIRECTOR OF POLICY AND DEVELOPMENT

KRYSTAL WILLIAMS
DIRECTOR OF GOVERNMENT RELATIONS DIVISION

ELIZABETH HILLIARD
ASSISTANT DIRECTOR OF GOVERNMENT RELATIONS DIVISION

POSITION ON PROPOSED LEGISLATION

BILL: HB 863 - Forensic Analysis – Letter of Exception – Criminal Proceedings

FROM: Maryland Office of the Public Defender

POSITION: Favorable

DATE: 3/30/2022

The Maryland Office of the Public Defender respectfully requests that the Committee issue a favorable report on House Bill 863.

We would first like to express to thank and acknowledge Delegate Terrasa for her determination in addressing this important issue. By amending the language, this bill not only clarifies the original intention of this regulation, it also serves to ensure the proper functioning of our criminal justice system.

As the Chief Attorney of the Forensics Division, I am responsible for retaining all experts for criminal cases where the Office represents the defendant. The Letter of Exception was intended to safeguard the integrity of physical evidence while in the custody of a crime lab. However, in the vast majority of cases, experts retained by the defense don't enter the premises of the crime lab or handle the physical evidence. Instead, they simply review the reports and data produced by a crime lab and provide opinions about the reliability and validity of the lab's conclusions. Under those circumstances, there's no danger that the evidence itself will be contaminated or harmed in any way.

The requirement for a Letter of Exception, therefore, is not only unnecessary, it interferes with defendant's right to present a defense. The decision whether an expert is qualified to testify is a different matter than safeguarding evidence from incompetent handling. That decision must be left to the court's discretion - not to an administrator who is in no position to determine whether an expert meets the requirements of MD RULE 5-702 given the specific facts and circumstances of the case.

Unfortunately, this regulation has led some court's to prevent qualified defense experts from testifying simply because they either do not have or have been denied the Letter of Exception. Such a situation infringes on the defendant's right to choose an independent, competent, and qualified expert to testify on her/his behalf. This should never happen as it could lead to a miscarriage of justice by preventing a defendant from exercising his right to due process.

I'm certain that none of us want an administrative regulation to be an impediment to a defendant's right to present a defense. However, if the regulation is not amended, the integrity of our criminal justice system will be compromised. It's imperative that the language of the current regulation be modified to ensure that the decision whether an expert is qualified, her conclusions have a sufficient factual basis and her testimony will assist the jury be left in the hands of the proper party – the presiding judge.

Submitted By: Maryland Office of the Public Defender, Government Relations Division.

Authored by: Jeff Gilleran, Chief Attorney, Forensics Division, Office of the Public Defender, 410 804 7107, jeffrey.gilleran@maryland.gov.

Sponsor Testimony, HB863, JPR.pdf

Uploaded by: Jen Terrasa

Position: FAV



THE MARYLAND HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401

March 31, 2022

To: The Honorable William C. Smith
Chair, Judicial Proceedings Committee

From: Delegate Jen Terrasa
District 13, Howard County

Re: Sponsor Testimony in Support of HB 863 – Courts - Expert Witnesses -
Letter of Exception

Dear Chairman Smith, Vice Chair Waldstreicher, and Members of the Judicial Proceedings Committee,

Thank you for the opportunity to present HB 863, which clarifies the ability of forensic experts testifying for defendants to provide analysis of lab results in criminal proceedings.

The Problem:

Because of a series of regulations and departmental guidance stemming from Health General § 17-2A-04, criminal defendants are being denied the right to a fair trial because they are unable to question the results of the state forensic lab, and in some cases are unable to have expert witnesses testify at trial.

Background:

Maryland law provides for the licensing of forensic labs by Maryland Department of Health (MDH). Health General § 17-2A-04 (“a forensic laboratory shall hold a license issued by the Secretary before the forensic laboratory may offer or perform forensic analysis in the State.”) An unlicensed lab may be granted a letter of exception by the Secretary of MDH to perform limited forensic analysis if it “[m]eets the exception requirements in regulations adopted by the Secretary.”

MDH through its Office of Health Care Quality (OHCQ) has interpreted this law to include the regulation of individuals who perform forensic analyses. Based on this, MDH promulgated regulations that require that individuals who perform forensic analysis, but

are not affiliated with a licensed laboratory, must obtain a Letter of Permit Exception from the OHCQ in a specific discipline. Not only is such a letter required for an individual to enter a state lab and perform original forensic analysis, but MDH also requires a Letter of Permit Exception for individuals who are reviewing results or conclusions of an original analysis. COMAR 10.51.01.03.54:

“Letter of permit exception means a letter granting limited authority to an individual not associated with a public or commercial laboratory, **who reviews results or conclusions of the original forensic analysis performed by a licensed forensic laboratory solely for the purpose of assessing the original opinion, interpretation, or conclusion of the licensed forensic laboratory.”** (emphasis added)

This essentially means those who work for the state lab can perform analyses on forensic evidence, while those who do not work for a state lab must seek a Letter of Permit Exception to even just review the work of someone who works for the state lab. So, a forensic expert would need to go to the state to get permission to question work performed by the state. Thus, creating a problem for defendants seeking to have an expert review analyses performed by the state lab in preparation for trial.

However, this problem goes even further. Some trial courts have interpreted the regulations to mean that in order to testify as a forensic expert witness in court on behalf of a defendant, the expert has to obtain a Letter of Permit Exception. In other words, these judges are interpreting the law and regulations to mean that whether an expert has a Letter of Permit Exception is a threshold question. Rather than follow the Daubert standard for admissibility of experts and scientific evidence which, as you probably know, makes the trial judge the gatekeeper who determines whether an expert's evidence is deemed reputable and relevant, some judges feel their hands are tied and they cannot move forward in deciding if the witnesses is qualified from their perspective.

This may, in part, stem from a 2012, OQHC letter which stated, “Failure to obtain a Letter of Permit Exception may effect the criminal courts’ decision when considering the admission of forensic expert’s opinions, interpretations and conclusions.”

The bottom line is that MDH should not have control over whether or not an expert can testify against them. It might make sense for the Department to have a say in who comes into their labs and does original forensic analyses on items in MDH custody and control. It has an interest in and an obligation to protect those items. However, it does not have a legitimate interest, and in fact, has a conflict of interest with respect to whether the defendants experts can review and question their conclusions. It, therefore, does not make sense to require defendants experts to have to request permission from OQHC to review reports and to testify in court. Significantly, it is my understanding that these Letters of Permit Exception are rarely, if ever granted.

Ultimately, the effect of the current law and set of regulations is that there are no individual chemists currently permitted to review drug test data from crime labs in the state of MD. Therefore, no one may independently challenge the drug evidence

presented against them in court. Should a criminal defendant wish to seek outside expertise from a qualified individual (e.g. chemistry professors from Johns Hopkins, UMD, other universities in the state, or consultants from many of the world-class STEM contracting and consulting companies in the area) they will not be able to.

What HB863 Does:

HB 863 fixes this simply by prohibiting the Court from requiring a MDH Letter of Exception for an individual to testify in a criminal proceeding who is reviewing the data, opinion, interpretation, or conclusion of another expert witness or forensic laboratory and is not handling any physical evidence.

Originally the bill was drafted to prevent MDH from requiring this Letter of Exception for an expert who was merely reviewing a report. However, working with the State's Attorneys Association, HB863 was amended in the House to prohibit the Court from requiring this so that a non-state lab affiliated expert could still testify in Court. Thus, the State's Attorneys Association has withdrawn their opposition to this legislation.

I respectfully urge a favorable report.